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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13
	)	

JOINT COMMENTS

Automated Communications, Inc. ("ACI"), Business Telecom, Inc. ("BTI") and U.S. Long Distance, Inc. ("USLD") ("Joint Commenters"), by their undersigned counsel, hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-35 (released Jan. 28, 1992) ("Notice").[1]

As detailed herein, the forbearance regulatory scheme the Commission has applied for the last decade to non-dominant interexchange carriers ("IXCs") providing domestic interstate services is lawful under the Communications Act. Moreover, forbearance regulation advances the public interest goal of minimizing regulatory burdens imposed on non-dominant carriers, allowing competitive forces to work effectively in the marketplace. If, however, the Commission determines in this proceeding that its forbearance policy is unlawful, Joint Commenters urge the Commission to sustain the important policy of imposing minimal regulatory requirements on non-dominant carriers by adopting maximum streamlined tariff regulation.

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[1] Joint Commenters are not affiliated with or related to each other in any way. They submit these comments on a joint basis to conserve their resources and those of the Commission by virtue of their similar interests in this rulemaking.

I. INTRODUCTION AND STATEMENT OF INTEREST

The Commission initiated this proceeding specifically to address the lawfulness of its tariff forbearance policy under the Communications Act in light of a complaint proceeding in which AT&T raised this issue against MCI.[2] The Notice was not adopted for Commission reexamination of the other aspects of the Competitive Carrier Rulemaking, such as the classification of carriers as "dominant" and "non-dominant," and other rule changes related to facilities and service authorizations designed to achieve the competitive policy goals of that proceeding.[3]

Joint Commenters are non-dominant IXCs which provide a variety of resold interstate telecommunications services, including 1+ and operator services. Joint Commenters offer their services to all end users in their service areas, and are subject to the Commission's jurisdiction as "common carriers" pursuant the Communications Act of 1934, as amended (the "Act").[4] Joint Commenters are specifically classified as "non-

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[2] Notice at para. 8. See AT&T v. MCI, File No. E-89-297, Memorandum Opinion and Order, FCC 92-36 (released Jan. 28, 1992), appeal pending sub nom. AT&T v. FCC, No. 92-1053 (D.C. Cir. filed Feb. 10, 1992).

[3] In Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, ("Competitive Carrier Rulemaking"), the Commission defined "dominant" carriers as those carriers possessing market power, and deemed other carriers "non-dominant." First Report and Order, 85 F.C.C.2d 1, 20-21 (1980). The Commission also decided to forbear from regulating domestic interstate services of non-dominant carriers. See id., Second Report and Order, 91 F.C.C.2d 59 (1982), recon. denied, 93 F.C.C.2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 F.C.C.2d 554 (1983); Fifth Report and Order, 98 F.C.C.2d 1191 (1984).

[4] See 47 U.S.C. § 153(h). See also NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

dominant" carriers, and, pursuant to the Commission's forbearance policy, are exempt from filing interstate tariffs, except with respect to operator services.[5] Consequently, Joint Commenters have a substantial interest in the Commission's review of the lawfulness of the forbearance policy, and in the possible reimposition of tariff filing requirements on non-dominant IXCs.

II. THE COMMISSION'S FORBEARANCE POLICY IS LAWFUL AND APPROPRIATE

A. The Commission Has Lawfully Exercised the Authority Conferred by Section 203(b) of the Act

In the complaint proceeding which prompted the Commission to initiate this rulemaking, AT&T alleged that MCI had unlawfully provided communications services to customers at rates, and on terms and conditions, not contained in interstate tariffs filed with the Commission.[6] AT&T claims that tariff filing is mandatory under Section 203 of the Act, and cannot be waived or modified by the Commission. AT&T, however, not only ignores the provisions of Section 203(b) of the Act, but also the Congressional ratification of the forbearance policy implicit in Congress's 1990 amendments to the Act.

AT&T is correct in interpreting Section 203(a) of the Act as imposing a tariffing requirement: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission . . . schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or

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[5] See 47 U.S.C. § 226.

[6] See AT&T v. MCI, supra; Notice, paras. 1-2.

radio communication . . . ." 47 USC § 203(a). AT&T, however, ignores the rest of Section 203, which clearly permits the Commission to modify "in its discretion" that requirement consistent with its statutory obligation to show "good cause" for its action.

Significantly, unless Section 203(b) is interpreted, as the Commission has done,[7] to give the Commission authority to exempt some carriers from the filing requirement, then portions of that Section have no meaning. It is a well-established principle of statutory construction that a statute must be interpreted to give full meaning to all its terms.[8] In this instance, the Commission's interpretation is consistent with the plain language of Section 203. Subsection (b)(2) of that section provides as follows:

> *The Commission may*, in its discretion and for good cause shown, *modify any requirement made by* or under the authority of *this section* either in particular instances or by general order applicable to special circumstances or conditions. . .

47 U.S.C. § 203(b)(2) (emphasis added). By its terms, this subsection allows the Commission to modify any requirement relating to the filing of tariffs, including those

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[7] In the Competitive Carrier docket, the Commission thoroughly reviewed the legislative history of the Act and subsequent judicial interpretations, and correctly concluded that it possesses "'substantial discretion in determining both what and how it can properly regulate,' so long as it is exercised in a manner that effectuates rather than frustrates the overriding statutory goals." 91 F.C.C.2d at 66, quoting Shapiro v. United States, 335 U.S. 1, 31 (1948). The Commission's interpretation of its enabling statute is entitled to substantial deference, unless inconsistent with the express terms of the statute. See Chevron USA Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

[8] See, e.g., United States v. Menasche; 348 U.S. 528, 538-39 (1955); ("It is our duty to give effect, if possible, 'to every clause and word of a statute.'") See also Sutherland Stat. Const. § 46.06 (5th ed. rev. 1992), Vol. 2A at 119 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute").

imposed by the Act itself.[9] Any other interpretation impermissibly ignores the key statutory phrase "made by ... this section," and renders it meaningless. The purpose of these words can only have been to grant expansive authority to the FCC. In addition, Section 203(c) provides, in pertinent part, that:

> No carrier, *unless otherwise provided* by or *under authority of this Act,* shall engage or participate in [interstate] communication unless schedules have been filed and published in accordance with the provisions of this Act . . . .

47 U.S.C. § 203(c) (emphasis added). The conditional "unless" language recognizes the Commission's authority to exempt carriers from the duty to provide telecommunications services exclusively under tariff.

Accordingly, since the Act expressly contemplates that the Commission may modify tariffing requirements and may authorize the provision of service other than under tariff, the Commission's tariff forbearance policy is permissible under the Act.[10]

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[9] In MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1192 (D.C. Cir. 1985), the court rejected the Commission's interpretation and declared that subsection (b)(2) only permits the Commission to modify requirements regarding the time and manner of filing, and not the filing obligation itself. The court held only that the Commission could not prohibit non-dominant carriers from filing tariffs, and did not rule on the validity of the forbearance policy. As shown above, this interpretation ignores the plain meaning of the section as a whole. Moreover, the MCI decision predates amendment of the Act in 1990, calling into question its precedential value.

[10] Thus, AT&T's reliance on the Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990), is misplaced. In the first place, that case construed a different statute, the Interstate Commerce Act. That Act, unlike the Communications Act, places no qualification on the requirement that a motor carrier "publish and file with the Commission tariffs containing the rates" for transportation or service it may provide. 49 U.S.C. § 10762(a)(1) (1988 ed.); see also 49 U.S.C. § 10761(a) ("Except as *provided in this subtitle*, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation

B. The 1990 Amendments to the Act Ratified The Commission's Forbearance Policy

Moreover, in 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), now codified as Section 226 of the Communications Act.[11] Section 226 requires informational tariff filings by non-dominant carriers with respect to operator services only. Significantly, it was enacted by Congress in the clear knowledge of the FCC's then-current regulatory forbearance policy.[12]

In directing the Commission to require informational tariffs for operator services, Congress did not require full cost support data to be submitted or 120 days' notice of rates

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or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter." 49 U.S.C. § 10761(a) (emphasis added)).

Given the plain language of the Communications Act, which in Section 203(c) recognizes that exemptions may be made "under authority of" the Act, not only "by" it, there is no reason to resort to analysis of a different statute, even one that was in part a model for the Communications Act, to construe Section 203. Moreover, the Congressional ratification of the forbearance policy in 1990 moots any statutory analysis that ignores such ratification. See discussion at Section B, below.

[11] 47 U.S.C. § 226.

[12] See S. Rep. No. 101-439, to accompany S.1660 (Commerce, Science and Transportation Com.), Aug. 30, 1990 ("Senate Report") at 7 (CBO cost estimate for FCC processing of tariffs), 23 (recognizing and approving the Commission's policy of reduced regulation of non-dominant carriers). Significantly, the 1990 amendments authorize the FCC to eliminate the informational tariff filings after four years if "competitive rates and services" reduce the need for tariff filings. Sen. Rep. at 23; see also 47 U.S.C. § 226(h). Congress specifically rejected the proposal in the original Senate bill that cost support for the informational tariffs be required because of the burden on the FCC and the substantial likelihood that imposing such a requirement would not result in commensurate public benefit. Sen. Rep. at 23-24.

to be given.[13] Moreover, Congress did not require informational tariffs to be filed for other service offerings of non-dominant carriers, although it was certainly aware that the Commission did not impose tariffs for such services. Even more significantly, Congress expressly declined to alter the FCC's regulatory policies for dominant carriers, continuing to subject them to the FCC's existing requirements, rather than relaxing them to correspond to those made applicable to non-dominant carriers regarding operator services.[14]

In short, any doubt prior to the enactment of § 226 as to the scope of the Commission's authority to forbear from requiring tariff filings for non-dominant carriers was removed when Congress enacted § 226 and ratified the Commission's authority to impose tariff forbearance. The legislative history of § 226 employs the Commission's dominant-non-dominant carrier distinction in not modifying the requirements applicable to dominant carriers.[15] Section 226 also authorizes the Commission to eliminate the informational tariff filing requirement without further Congressional action within four years. Clearly, in imposing the informational tariff filing requirement, Congress deliberately imposed only a

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[13] It is evident that Congress intended the "informational tariff" under Section 226(h) to be materially different from a "schedule of charges" under Section 203(a). Section 226(h)(1)(A) provides that any changes in informational tariffs "shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect[;]" in contrast, Section 203(b)(1) states that "[n]o changes shall be made in the charges, classifications, regulations or practices which have been . . . filed and published [under Section 203(a)] except after one hundred and twenty days notice to the Commission and to the public . . . ." Section 226(h), unlike Section 203, does not authorize the Commission to make modifications or exceptions to the filing requirements. Section 226(h)(1)(B), however, expressly authorizes the Commission, under certain conditions, to waive the informational tariff requirement after four years from the date of enactment of the section.

[14] See Sen. Rep. at 23.

[15] See id.

minor restriction on the FCC's established authority under the Act to adopt the forbearance policy. Indeed, if Congress believed that Section 203 mandated tariffs for operator service providers, it is highly unlikely that it would have omitted an explicit rejection of the tariff forbearance policy in enacting Section 226.[16]

Accordingly, AT&T's challenge to the forbearance policy must clearly fail now that Congress has ratified the FCC's interpretation of the scope of its authority under Section 203 of the Act.

III. IF THE FORBEARANCE POLICY IS FOUND UNLAWFUL, THE COMMISSION SHOULD APPLY MAXIMUM STREAMLINED REGULATION TO NON-DOMINANT IXC TARIFF FILINGS

Assuming arguendo that the Commission's tariff forbearance is unlawful, the Commission should, consistent with the underlying policy of the Competitive Carrier Rulemaking, adopt maximum streamlined regulation of any tariff rules it may impose on non-dominant IXCs. Any reimposition of tariffing requirements should be implemented in a manner far less burdensome than current Part 61 requirements applicable to dominant carriers subject to rate regulation. Maximum streamlining should, for example, allow non-dominant carriers to change rates on one day's notice; exempt non-dominant carriers from

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[16] Section 226(h) clearly does not supersede Section 203 with respect to operator services only, leaving Section 203 in effect as to all other common carrier services. Section 226(i) provides that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act." 47 U.S.C. § 226(i). Thus, Section 226 cannot be read to create an exception to Section 203 that did not already exist in the Act. Section 226(h) only makes sense if Congress intended to ratify and confirm the Commission's policy of permissive forbearance for non-dominant carriers.

filing cost-support data; and retain the presumption of lawfulness of all non-dominant carrier tariffs. Further, the tariff filing fee should be reduced, and flexible and/or banded rates should be permitted. Moreover, the Commission should allow non-dominant carriers to refer to provisions in filed tariffs of other carriers where it would be administratively efficient to do so. For example, such cross-references could include incorporation of general terms and conditions and service definitions where appropriate. Such maximum streamlining would sustain the valid policies of the Competitive Carrier Rulemaking by minimizing regulatory burdens imposed on non-dominant IXCs.

IV. CONCLUSION

As detailed above, the Commission should terminate this proceeding because its tariff forbearance policy is both lawful and proper. If the Commission concludes, however, that the law requires it to implement tariff filing rules for non-dominant carriers, then it should

adopt a policy of maximum streamlining to avoid imposing unnecessary, burdensome regulations on non-dominant carriers which would harm effective competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 1992, copies of Joint Comments were served by hand on the following:

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